No. 17-70196

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL FAMILY FARM COALITION, *et al.*,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents,

and

MONSANTO COMPANY,

Intervenor-Respondent.

ON PETITION FOR REVIEW FROM THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

PETITIONERS' REPLY BRIEF (REDACTED)

CENTER FOR FOOD SAFETY
George A. Kimbrell
Sylvia Shih-Yau Wu
917 SW Oak Street, Suite 300
Portland, OR 97205
T: (971) 271-7372 / F: (971) 271-7374

EARTHJUSTICE
Paul H. Achitoff
850 Richards Street, Suite 400
Honolulu, HI 96813
T: (808) 559-2436 / F: (808) 521-6841

Counsel for Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

FEDERAL STATUTES

CODE OF FEDERAL REGULATIONS

FEDERAL REGISTER

OTHER AUTHORITIES

ARGUMENT

I. EPA VIOLATED FIFRA

EPA and Monsanto (Respondents) pretend XtendiMax's registration is two separate agency actions, defending them in isolation. Respondents want to "have their cake and eat it too," seeking to defend only the original approval and its rationale, but still relying on the amended approval when convenient. But the decisions are two parts of the same whole. There is only one operative registration for XtendiMax's new use: the Amended Registration issued October 12, 2017. ER72. That decision amended the registration issued November 9, 2016, ER01, changing the pesticide's label and the use terms and conditions, ER72 ("Registration Amendment" to "Change Directions for Use and additional Terms and Conditions to the Registration as Registered on November 9, 2016" to "respon[d] to the high number of crop damage incidents reported to EPA."). Thus, when EPA issued the October 2017 amended approval it *replaced* the prior 2016 registration. *Id.* (the revised label "supersedes all previously accepted labeling"). Monsanto cannot sell XtendiMax under only the terms and conditions of the 2016 registration. And to be clear there is only one pesticide product at issue, and that product is before the Court in the present petition for review, *see* ECF Nos. 62; 68, not two separately challenged and consolidated actions.

From this flows several important conclusions. First, Petitioners' challenge is not time-barred and Petitioners have standing. Second, the 2017 evidence of millions of acres of unprecedented crop damage is an important part of the administrative record that was before the agency. Third, the 2017 registration itself must be supported by substantial evidence, yet EPA issued its revised decision with no explanation or evidence supporting the new provisions' purported efficacy. Instead, the only evidence underlying the 2017 decision is the catastrophic growing season, showing that EPA's previous analyses—which it is doubled down on in the 2017 decision—were wrong, and its mitigations grossly ineffective. Fourth and finally, that is the one reason the 2016 decision remains relevant: EPA relied entirely on its earlier risk assessments instead of offering any new ones. ER72. Those assessments did not address the 2017 changes and cannot support them as a matter of law. But even for the registration parameters they covered, EPA's assessments violated FIFRA: EPA failed to adequately address volatility, tank mix risks, and the damage dicamba drift causes farmers.

A. Petitioners' Challenge Is Timely and Petitioners Have Standing.

Monsanto's jurisdictional challenges, being predicated on the existence of two separate agency actions, badly miss the mark. First, Petitioners' challenge is not time-barred. As explained above, when EPA issued the amended Oct 12, 2017 registration, that decision became the operative registration, superseding the prior

approval. ER72. The prior approval is relevant only because EPA relies on it wholesale for the amended registration's underlying assessments and rationale; it is no longer the effective approval date for filing a challenge. Monsanto does not challenge the amended petition for review as time-barred. ECF Nos. 62, 68.

Even if the 2016 filing date were still relevant, Petitioners' petition for review was timely. FIFRA provides 60 days to petition for review of a decision following a hearing, and the operative date for judicial review is two weeks from the date an order is signed, unless EPA explicitly provides a different date for entry of an order, which here EPA did not do. Thus, pursuant to 40 C.F.R. § 23.6, EPA's original decision was final as of November 23, 2016, and Petitioners' January 20, 2017 Petition for Review was filed within 60 days. Pet'rs' Resp., ECF No. 12-1. Monsanto's cherry-picked statements demonstrate nothing other than that XtendiMax was registered for use as of November 9, 2016, the day EPA signed the registration decision document. Monsanto Br. 22-23; ER1. That has nothing to do with when the registration was entered for judicial review.

Monsanto's unprecedented interpretation of an explicit date of entry under 40 C.F.R. § 23.6 is contradicted by the Court's rulings in this case and others, and EPA has squarely rejected it. Monsanto cites no case finding that a pesticide's

registration date constitutes an explicit date of entry for judicial review,[1] because none exists. Rather, both this Court and EPA previously agreed EPA did not explicitly provide November 9, 2016 as the date of entry under 40 C.F.R § 23.6. Order Discharging Order to Show Cause, ECF No. 23 (finding the 2016 Petition for Review to be "timely filed," citing 7 U.S.C. § 136n(b) and 40 C.F.R. § 23.6); Pet'rs' Resp. 2, ECF No. 12-1 (EPA's position that the two-week period applied).[2] Had EPA explicitly named November 9, 2016 as the date of entry, it would have so informed the Court.[3]

Second, Petitioners have standing. Monsanto does not question the fundamental Article III bases of Plaintiffs' standing, *i.e.*, that Petitioners include farmers and conservationists with economic and environmental interests harmed by EPA's XtendiMax approval. Opening Br. 1-2, ECF No. 70-1; Addendum at A092-

---

[1] *Selco Supply Co. v. U.S. EPA*, 632 F.2d 863 (10th Cir. 1980) is irrelevant, issued before 40 C.F.R. § 23.6's enactment.

[2] The Ninth Circuit and EPA have twice maintained this interpretation. Pet. Review 1, *Ctr. for Food Safety v. U.S. EPA*, No. 14-73283 (9th Cir. Oct. 30, 2014), ECF No. 1-1; Order Denying Mot. Dismiss, *Nat'l Family Farm Coal. v. U.S. EPA*, No. 17-70810 (9th Cir. June 12, 2017), ECF No. 43; EPA's Resp. ¶ 4, *Nat'l Family Farm Coal. v. U.S. EPA*, No. 17-70810 (9th Cir. May 23, 2017), ECF No. 24. There was no reason for Petitioners to have filed earlier protectively, as Monsanto proclaims.

[3] Monsanto mischaracterizes the Federal Register notice finalizing 40 C.F.R. § 23.6: the quoted EPA statement merely suggests courts may disregard 40 C.F.R. § 23.6 to afford litigants "their right to preliminary relief." 50 Fed. Reg. 7268, 7269 (Feb. 21, 1985).

A0147. *Friends of the Earth, Inc. v. Laidlaw Environmental Serv.*, 528 U.S. 167, 180-81 (2000). Instead, Monsanto's argument is again predicated on the erroneous assumption there are two separate challenges to two separate agency actions, and Petitioners need separate standing to challenge the 2017 decision. Yet the same standing injury, causation, and redress analysis applies: *This is not a new pesticide being registered: this is the same pesticide being registered for the same use in revised fashion.*

The 2017 registration challenge is not a separate "claim," nor a "collateral attack." It is the only active claim, on the only active approval, for the only pesticide product at issue. EPA's approval of XtendiMax violated FIFRA, and there is only one remedy: vacating the registration, not returning to the superseded 2016 registration.[4]

Finally, Petitioners do not need to "collaterally attack" the 2016 decision, because EPA defends the 2017 decision solely by incorporating its prior 2016 risk assessments and determinations, putting them squarely at issue. Petitioners' challenge therefore is not limited to the additional terms and conditions EPA

[4] Monsanto's argument that Plaintiffs are limited to the new provisions of the amended registration would lead to absurd results and allow agencies to prevent meaningful judicial review simply by immediately revising the registration with a single new condition while relying on prior assessments and rationale. A timely challenge to the revised registration could focus only on the one new condition, insulating everything else.

adopted in 2017, and this Court's vacatur of the 2017 amended registration will redress Petitioners' members' ongoing injuries.[5]

B. EPA Did Not Support the Amended Registration With Any Rationale, Evidence, or Assessments Showing Why It Will Work.

For the registration to pass muster, FIFRA requires that EPA have substantial evidence showing that "amending the registration in the manner proposed by the applicant would not significantly increase the risk of any unreasonable adverse effect on the environment." 7 U.S.C. § 136a(c)(7)(B). In 2017, Monsanto proposed, and EPA amended, the XtendiMax registration, changing its use conditions. ER072. Yet at the same time, EPA relied entirely on its assessments, findings, and rationale supporting its 2016 decision. *Id.* But those 2016 assessments no longer assess or consider the "registration *in the manner proposed by the applicant*" (or even as EPA approved it). EPA's failure to support its 2017 decision with assessments, evidence, or even explanatory rationale as to how the registration meets basic FIFRA standards violates the statute's plain language. 7 U.S.C. § 136a(c)(7)(B). It also violates fundamental precepts of administrative law: agencies must explain their decisions, support them, and show a rational connection between the facts found and the choice made. *See, e.g.,*

---

[5] Even as to the changes, Monsanto's claim that the revisions protect Petitioners' interests is belied by copious record evidence demonstrating they fail to address harm from XtendiMax's significant volatility. *See infra* and Opening Br. 21-33 (and citations therein).

Motor Vehicles Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983).

Respondents' only defense is that the 2017 use directions were more protective of farmers and the environment than the 2016 registration. Regardless of whether that proves accurate, it does not absolve EPA from its statutory responsibilities. Further, the 2016 rationale cannot assess the subsequent changes' efficacy, and EPA cannot leave farmers and the Court to guess. *T-Mobile S., LLC v. City of Roswell, Ga.,* 135 S.Ct. 808, 815 (2015) ("[T]he orderly functioning of the process of substantial-evidence review requires that the grounds upon which the administrative agency acted be clearly disclosed, and that courts cannot exercise their duty of substantial-evidence review unless they are advised of the considerations underlying the action under review.") (internal citations and alterations omitted); *Humane Soc. of U.S. v. Locke*, 626 F.3d 1040, 1049 (9th Cir. 2010) ("Without an adequate explanation, we are precluded from undertaking meaningful judicial review."); *Patterson v. Comm'r of Soc. Sec. Admin.*, 846 F.3d 656, 663 (4th Cir. 2017) ("[T]he dispute here arises from a problem that has become all too common among administrative decisions challenged in this court—

a problem decision makers could avoid by following the admonition they have no doubt heard since their grade-school math classes: Show your work.").[6]

EPA's brief is the only place it lays out any rationale for its 2017 revisions. EPA Br. 67-70, ECF No. 92. But reliance on *post hoc* rationalizations to support an agency's decision is another cardinal violation of black letter law. *Motor Vehicle Mfrs. Ass'n.*, 463 U.S. at 50 ("[C]ourts may not accept appellate counsel's *post hoc* rationalizations for agency action" because "[i]t is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself.").[7]

EPA strangely attempts to defend its 2017 decision by alleging its hands were tied: it was forced to accept whatever Monsanto proposed as an amended registration. As an initial matter, that perception is false. EPA did not need Monsanto's permission to, for example, make XtendiMax a restricted use pesticide. 7 U.S.C. § 136a(d)(2). EPA also could have issued an emergency order

---

[6] EPA's request for deference violates this Court's instruction that courts cannot "defer to a void." *Oregon Nat. Desert Ass'n v. Bureau of Land Mgmt.*, 625 F.3d 1092, 1121 (9th Cir. 2010).

[7] EPA claims it was somehow perfectly logical to just rely on its 2016 assessments because, even after the catastrophic 2017 season, there was "no expectation" the risks "would be any greater than assessed at the time of the original registration." EPA Br. 19. Such decision-making epitomizes arbitrary and capricious agency action, contrary to record evidence.

suspending the pesticide's use, 40 C.F.R. § 164.123, or started an interim administrative review, 7 U.S.C. 136a(c)(8), and expedited it, 40 C.F.R. § 154.34. And it could have simply asked this Court to remand and vacate the registration, as it did in *Center for Food Safety v. U.S. EPA*. EPA Mot. Voluntary Vacatur & Remand, No. 14-73353, ECF No. 121-1 (filed Nov. 24, 2015). But regardless of whether Monsanto agreed with the revisions, EPA must still support its amended registration, which it did not. In fact, the only evidence in the record underlying the 2017 decision is the copious evidence of millions of acres of dicamba drift harm. Opening Br. 8-12 (and citations therein).

Unable to dispute it, Monsanto bizarrely claims (Monsanto Br. 28 n.18) the 2017 evidence is actually not part of the administrative record—contrary to EPA's inclusion of that evidence—as well as long-settled administrative law that the record includes everything before the agency "directly or indirectly considered by the agency decision-makers and includes evidence contrary to the agency's position." *Thompson v. U.S. Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989) (internal quotation marks omitted). And nowhere in that record evidence or 2017 decision document, *see* ER072, does EPA explain how its 2017 changes will prevent these harms from reoccurring. Crucially, the changes EPA made do *not* address the main well-spring of the 2017 damage: XtendiMax's volatility and vapor drift. Opening Br. 10-12 (and citations therein); *id.* at 28-29 (and record

citations therein). Nor did EPA explain how XtendiMax users could adequately follow its exceedingly complex directions. Opening Br. 30-33. EPA's decision can only be sustained "if it is supported by substantial evidence when considered *on the record as a whole*." 7 U.S.C. § 136n(b) (emphasis added). EPA's failure to explain *in the record* how its revised approval will address 2017's crop damage problems is fatal.

This Court has instructed repeatedly that EPA's position here—"trust us, we know what we are doing"—does not cut it. "[T]he agency must, at a minimum, support its conclusions with studies that the agency deems reliable." *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1075 (9th Cir.2011); *Pollinator Stewardship Council v. E.P.A.*, 806 F.3d 520, 538 (9th Cir. 2015) (Smith, J., concurring) ("Professional judgment and knowledge do not meet the substantial evidence standard independent of data and facts.").

C. EPA Used the Wrong Legal Standard.

Respondents do not dispute EPA used the wrong legal standard to approve XtendiMax when it applied the unconditional registration standard to a conditional new use. Opening Br. 16-18. They argue the error was harmless, but are wrong. FIFRA contemplates a two-step process for a new use registration; there cannot be a conditional new use of a pesticide without a preexisting general registration that itself meets the basic FIFRA "generally cause no unreasonable adverse effects"

standard. 7 U.S.C. § 136a(c)(5)(D). Any conditional new use approval must tier off that, and EPA must show why the new use will not even "significantly increase the risk" of any such adverse effects coming to pass *above and beyond the basic registration*. *Id.* § 136a(c)(7)(B); Opening Br. 16-18. Congress added conditional registrations to create flexibility, but intended them to be the *exception*, not the rule, for registrations. *Id.* § 136a(7) (entitled "Registration under special circumstances"). Where data is missing, Congress allowed temporary conditional registration, but required further safeguards—including a finding that conditional registration will not even *increase the risk* of adverse effects occurring.[8] The difference is not harmless error.

Recently this Court held EPA could not ignore a requirement for another type of conditional registration, mandating that EPA make an additional finding, beyond that of unconditional registration, that its action is in the public interest. *NRDC v. EPA*, 857 F.3d 1030 (9th Cir. 2017). The Court held such a finding was an additional safeguard Congress demanded for allowing such a temporary conditional registration in the absence of data. *Id.* at 1037 (discussing the

[8] While a conditional use registration can lack some general data, the registrant must still have "all data" about the new use specifically, including "at a minimum, data needed to characterize *any incremental risk* that would result from the approval." 40 C.F.R. § 152.113(a)(1)-(2) (emphasis added). This is a different type of analysis.

legislative history). Because EPA assumed it had met that finding and did not support it with substantial evidence, the Court vacated the registration. *Id.* at 1042. It was not enough that EPA found the registration had the "potential" to be in the public interest; the Court held the agency had to find the registration "*is* in the public interest." *Id.* (emphasis in the original).

The same is true for this conditional registration. Finding a pesticide's unconditional registration "will not *generally cause* unreasonable adverse effects" is not the same as finding that the conditional new use of that pesticide in a novel way will not even "*significantly increase the risk* of any unreasonable adverse effect on the environment" beyond the underlying registration.[9] EPA used the wrong legal standard and failed to make the statutorily required findings, and cannot be assumed to have made them.

[9] EPA also transposed only *half* the unconditional standard, which requires it find that a pesticide will not generally cause unreasonable adverse effects "when used in accordance with *widespread and commonly recognized practice*." 7 U.S.C. § 136a(c)(5)(D) (emphasis added). The novel over-the-top use of dicamba on genetically engineered crops is unprecedented and the byzantine use instructions EPA set forth nearly impossible to follow, the antithesis of a "widespread and commonly recognized" agricultural practice. Opening Br. 30-33. EPA may have attempted to bootstrap this standard into a conditional registration because XtendiMax's new use failed to meet this requirement.

D. Even if EPA Could Rely on Its 2016 Decision, It Still Is Not Supported by Substantial Evidence.

Finally, any attempt to incorporate EPA's past decision and rely on its prior assessments is building on a foundation of sand, because those assessments were flawed.

1. EPA's Treatment of Agronomic Costs Violated FIFRA.

Despite FIFRA's requirement to analyze costs to farmers from dicamba drift, EPA failed to do so. Opening Br. 18-21. EPA must explain how XtendiMax's alleged benefits outweigh those costs, 7 U.S.C. § 136(bb), but its 36-page 2016 decision document, ER01-36, has only a single paragraph even mentioning drift harms, without analyzing or weighing them, despite *anticipating* them at potentially "unacceptable frequencies or levels," ER035, ER368. EPA's 2017 registration has no new decision document, but relies entirely on this prior decision. Worse, the 2017 decision was made after all the 2017 record evidence of the unfolding agronomic crisis was before the agency. Opening Br. 8-12 (and citations therein).

Respondents rely on the label use restrictions as supposedly showing EPA weighed costs to farmers. But *nothing in the record* explains EPA's *rationale* in choosing those specific measures, or *explains why they will work*. This is particularly important given the unprecedented length and complexity of the use restrictions, and the record evidence that users found them unworkable in real

world conditions. Opening Br. 30-33. Substantial evidence in the 2017 record shows EPA's conclusions in 2016 (upon which EPA relied for the 2017 amended decision) were wholly inadequate to protect farmers. And there is nothing supporting a conclusion that what EPA added in 2017 will avoid a repeat. In particular, *EPA did nothing to address vapor drift harms to farmers*, the main source of the problem. Opening Br. 28-29.[10]

Additionally, Monsanto grossly misrepresents the facts concerning XtendiMax's benefits. Soybeans did not have "record yields" in 2017; yields actually fell 6%.[11] Total production increased only because soy acreage increased 8% from 2016. *Id.* at 3. Monsanto disputes that 3 million acres of soybeans were damaged, Monsanto Br. 14, but the undisputed record evidence shows the total was over 3,100,000 acres by August 2017. ER375. Nine of the ten states that produced the most soybeans, hard hit by dicamba injury, experienced yield declines up to

[10] EPA half-heartedly claims, without record citation, the use instructions address volatility by prohibiting application between sunset and sunrise, to address temperature inversions. EPA Br. 68. But this provision in the label section for "spray drift management" says nothing about vapor drift. ER092. More importantly, this use instruction cannot meaningfully prevent vapor drift because volatilization, unlike spray drift, can occur *days* after the application. *See* ER 377-78 (Xtendimax vapor detected 3-4 days after application); ER351.

[11] Monsanto Br. 12, n. 3: USDA 2017 Crop Production Summary at 53, showing U.S. yield decline from 52.0 to 49.1 bushels/acre from 2016 to 2017.

23%.[12] In contrast, of the ten states Monsanto cites as having few or no dicamba complaints (Monsanto Br. 13), six grow virtually no soybeans.[13] Finally, XtendiMax does not reduce tillage or erosion, as Monsanto misrepresents, Monsanto Br. 6; EPA rejected this claim for lack of any supporting data. ER637.

2. EPA's Volatility Treatment Violated FIFRA.

Respondents do not dispute EPA disregarded its own projections establishing XtendiMax vapor concentration off-field could injure non-target plants.[14] Opening Br. 22-24; ER463-464 (0.0208 ug/m^3 projection exceeded the No Observed Adverse Effect Concentration, or NOAEC, of 0.0177 ug/m^3). They insist the exceedance was negligible, and EPA's dismissal of it reasonable, citing the "conservative assumptions" of Monsanto's studies. EPA Br. 35; Monsanto Br. 34-35. They are wrong.

As a factual matter, EPA admitted the volatility studies could have underestimated vapor drift. ER464. As a legal matter, this Court already squarely

---

[12] *Id.* at 53, showing soy yields by state, *e.g.* 23% decline in Kansas, where dicamba injury was "common throughout state" (ER422); compare to updated dicamba injury-by-state map, link at ER375.

[13] *Id.* at 52.

[14] Respondents repeatedly accuse Petitioners of relying solely on post-2016 registration events to allege harm from XtendiMax, including its volatility. EPA Br. 42. This framing is false. Those events are relevant record evidence of unlawfulness of the 2017 decision at issue, in which EPA *still* failed to address volatility harms. Regardless, *the 2016 record itself* had extensive evidence making drift damage eminently foreseeable. Opening Br. 5-8, 22-23 (and citations therein).

rejected their argument—twice. *Pollinator Stewardship Council v. U.S. EPA*, 806 F.3d 520, 531 (9th Cir. 2015) (EPA could not disregard data exceeding EPA's "level of concern" even if the level was "inherently conservative"); *Natural Res. Def. Council v. U.S. EPA*, 735 F.3d 873, 884 (9th Cir. 2013) (rejecting argument EPA could disregard data above its harm threshold because the threshold was "very conservative").

Respondents emphasize 0.0208 ug/m^3 is still below the Lowest Observed Adverse Effect Concentration, or LOAEC, Monsanto Br. 34; EPA Br. 36, but EPA admitted *it lacked sufficient data* to understand the effects of vapor levels between the NOAEC and LOAEC. ER463 (large gap between NOAEC and LOAEC creates "uncertainty as to where effects to plants from vapor-phase exposure to dicamba may occur."). There is no (let alone substantial) evidence showing this NOAEC exceedance would not result in unreasonable adverse effects. EPA knew of XtendiMax's volatility, ER631; its dismissal of data showing potential harm from XtendiMax vapor violated FIFRA.

Respondents feebly attempt to distinguish *Pollinator Stewardship*, arguing there, EPA was required by regulation to conduct further testing. EPA Br. 37; Monsanto Br. 36. This fails: in both cases, EPA selected safety thresholds, then disregarded data exceeding those thresholds. *Pollinator Stewardship*, 806 F.3d at 525 (noting data exceeded risk quotient calculated by EPA); ER463-64 (comparing

dicamba vapor concentrations with the EPA-determined NOAEC). Moreover, *Pollinator Stewardship* tracks *Natural Resources Defense Council*, where this Court vacated a pesticide registration because the test data triggered EPA's level of concern, and where EPA was not required to conduct further testing. *See* 735 F.3d at 884 ("Having established a rule of decision of less than or equal to 1,000, EPA cannot unmake it ….").

The present case is on all fours with both *Pollinator Stewardship* and *Natural Resources Defense Council*. EPA determined the NOAEC, and assessed the effects of XtendiMax vapor drift by comparing projected vapor concentrations to that NOAEC.[15] ER463-464; Opening Br. 22-24. It found XtendiMax vapor off-field could exceed the NOAEC, indicating potential for unreasonable adverse effects. Rather than assessing those effects, EPA fudged the problem, calling the exceedance "essentially at or below" the NOAEC. ER464. EPA's disregard of data that exceeds its own harm threshold violated FIFRA.

[15] Monsanto urges the Court to ignore 0.0208 ug/m^3 because it represents a one-hour peak dicamba concentration, while the NOAEC was derived from 24-hour exposure to dicamba, even though Monsanto failed to measure a one-hour NOAEC in the humidome study. More fundamentally, EPA compared the one-hour 0.0208 ug/m^3 projection against the 24-hour NOAEC, and stood by its assessment. ER464. Neither Monsanto's preference, nor that EPA conducted a different assessment for a different pesticide, Monsanto Br. 35 n.21, warrants any deference.

3. EPA's Treatment of Tank Mixes Violated FIFRA.

Respondents admit EPA's approval was predicated on authorizing only XtendiMax tank mixtures that will not amplify XtendiMax's volatility. Opening Br. 24-26. They also admit [redacted]. EPA Br. 39; Monsanto Br. 37-38; ER928. Yet, EPA did not require any additional volatility testing for XtendiMax tank mixtures with Monsanto's numerous Roundup pesticides.[16]

EPA responds that the mixture's volatility is lower than that of M1691, an earlier (never approved) dicamba formulation. M1691 is irrelevant: XtendiMax is before the Court. EPA acknowledges it has the statutory duty to ensure that XtendiMax—not M1691—mixtures would not unreasonably damage neighboring crops and plants. EPA cannot hide behind another pesticide formulation's volatility, which EPA found to be more volatile than XtendiMax, and which EPA never approved. Opening Br. 25.

Monsanto' argument—that XtendiMax's label restrictions protect against any increased volatility from XtendiMax mixtures—also fails. Monsanto Br. 38

[16] That EPA prohibited tank mixtures where patents show synergistic effects is irrelevant, EPA Br. 38. Tank mixtures can have increased volatility from "chemical changes in the applicator's tank" that occur without synergism, which only concerns increased toxicity. ER457-58.

(citing SER54-132). The cited materials actually reinforce Petitioners' case, showing Roundup Xtend (containing XtendiMax and a specific Roundup formulation) has substantially greater volatility than XtendiMax in both laboratory and field studies, *see* SER70-71, Figs. 1 & 2, and consequently would generate off-field dicamba concentrations exceeding EPA's safety threshold *See supra* 15-17.

Yet, rather than requiring individual tank mixture volatility testing of XtendiMax and Roundup components, EPA allowed tank mixes of XtendiMax and glyphosate formulations in the Roundup product family without ever testing for unreasonable adverse effects from their increased volatility.[17] EPA's abdication of its duty to ensure XtendiMax mixtures "would not significantly increase the risk of any unreasonable adverse effect on the environment" violated FIFRA. 7 U.S.C. § 136a(c)(7)(B); *Pollinator Stewardship*, 806 F.3d at 532 ("Without sufficient data, the EPA has no real idea whether sulfoxaflor will cause unreasonable adverse effects on bees.").

II. EPA VIOLATED THE ENDANGERED SPECIES ACT

Respondents admit the essential facts establishing EPA violated ESA § 7(a)(2) when it concluded registering XtendiMax will have "no effect" on

---

[17] *See* XtendiMax withVaporGrip Technology – Tank Mix Products, http://www.xtendimaxapplicationrequirements.com/Pages/tankmix.aspx (authorizing XtendiMax with numerous Roundup products). In stark contrast, EPA required individual testing for *spray* drift for each XtendiMax tank mixture. ER063.

hundreds of endangered species or any of their critical habitats, and EPA therefore could authorize spraying it on millions of acres without consulting the U.S. Fish and Wildlife Service (FWS). Respondents reiterate EPA's risk assessment process was "conservative," "careful," and "cautious," but puffery notwithstanding, EPA's assessments were not conservative, as the ESA requires, but rigged against consultation. EPA unlawfully employed a consultation standard that risks pushing these species even closer to extinction by substituting EPA's policies for Congress's.

The ESA requires consultation whenever XtendiMax exposure would have "[a]ny possible effect, whether beneficial, benign, adverse or of an undetermined character" on any listed species or critical habitat. *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1027 (9th Cir. 2012) (en banc) (citation omitted); Opening Br. 33-36. EPA must consult FWS if registering XtendiMax has "any chance of affecting listed species or critical habitat—even if it is later determined that the actions are 'not likely' to do so." *Id.* EPA sidestepped consultation by characterizing as "no effect" all exposures risking harm not exceeding EPA's self-designated "level of concern." Opening Br. 38-39. EPA's "no effect" determinations violated ESA § 7(a)(2) as a matter of law, and no deference is due EPA's policy-driven conclusions.

A. EPA Failed to Use the Proper ESA Consultation Standard.

EPA's own documents reveal EPA's "level of concern" threshold is less protective than "any possible effect." EPA's guidance document, used to assess risk to both plentiful and endangered species, was designed to implement *FIFRA*, which employs a harm/benefit balancing inimical to the ESA's conservation mandate, requiring only that EPA disallow "unreasonable" harm risks. Opening Br. 18-19. That perspective permeates the guidance. RER937, 939, 946, 947, 972 (repeating "unreasonable adverse effect" standard); *see also, id.* at 961 (referring to use of "regulation-required set of toxicity studies" required by FIFRA, not ESA); ER741 (citing ecological effects guidelines "intended to meet toxicity testing requirements for terrestrial and aquatic animals and plants under TSCA, FIFRA and FFDCA," not ESA).[18] ESA § 7(a)(2)'s consultation requirement is designed to "insure" no protected species is jeopardized or critical habitat adversely modified, *id.*, *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 173 (1978), and "reveals a conscious decision by Congress to give endangered species priority over the 'primary missions' of federal agencies," *id.* at 185. In contrast, EPA's guidance is designed to ensure protections for species and habitat are the "least disruptive to agriculture and other pesticide users." RER995.

[18] *See* https://www.epa.gov/test-guidelines-pesticides-and-toxic-substances/series-850-ecological-effects-test-guidelines.

In relying on its "levels of concern," EPA therefore assessed risk by examining the likelihood XtendiMax exposure will cause *harm*—"adverse effects"—instead of whether it has "any chance" of having "[a]ny possible effect, whether beneficial, benign … or … undetermined." RER975 ("Risk characterization integrates the results of exposure and toxicity data to evaluate the likelihood of *adverse* ecological effects on non-target species.") (emphasis added); *see also* RER960 (risk assessment looks for evidence of "reduced survival and reproductive impairment.").

Monsanto insists EPA's "no effect" determinations reflect findings "the species would not respond in any manner to the herbicide," Monsanto Br. 43-45. This might be an appropriate standard, but the record contains no evidence EPA employed it. EPA's assessments contain no such findings—Monsanto quotes FWS's guidance providing what EPA *ought* to have done. Monsanto Br. 44. EPA describes its standard quite differently: "The criteria indicate whether a pesticide, when used as directed, has the potential to cause *adverse effects* to non-target organisms." ER632 (emphasis added).

EPA's acute risk assessments of endangered animals actually are based on the pesticide's LD_{50} or LC_{50}—measures of how much of the chemical is needed to

kill half a sample population.[19] RER975; *see also* RER971 (EPA uses LD_{50} and LC_{50} as acute toxicity endpoints for terrestrial animals). EPA divides estimated exposure by the pesticide's toxicity to generate a Risk Quotient (RQ), which measures mortality risk, derived from the LD_{50} or LC_{50}. RER975. EPA then applies to this RQ a "level of concern" (LOC) EPA creates based on internal policy. EPA uses LOCs to analyze "the need to consider regulatory action … [and] to indicate when a pesticide use as directed on the label has the potential to cause *adverse effects* on non-target organisms." *Id.* (emphasis added).

"Adverse effects" are not the ESA consultation standard, and EPA's "levels of concern" are not moored to any ESA standard. LOCs do not measure a hypothetical "no response" exposure; they reflect EPA's "interpretative policy" on how much risk of mortality EPA considers acceptable. RER975.[20] Thus, LOCs measure EPA's unilateral policy decisions about how much risk of endangered animal mortality EPA will accept, which EPA arbitrarily labels "no effect."[21] *See*

---

[19] LD is Lethal Dose, LC is Lethal Concentration.

[20] EPA argues: "Below [the LOC], there is no evidence of any discernible effect to that species." EPA Br. 59. It cites no evidence its analyses work this way, and its guidance provides no such requirement or approach, but instead is based on an arbitrary fraction of LD_{50}.

[21] *See* Lewis Carroll, *Through the Looking-Glass*, chapter 6, p. 205 (1934) ("When I use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean—neither more nor less." "The question is," said Alice, "whether you can make words mean so many different things.").

RER993 (risk assessment is "based on the median lethal dose estimate," and discussing how LOCs set the acceptable likelihood of mortality); ER976 (same). EPA finds "no effect" whenever the Risk Quotient (likelihood of mortality) does not exceed its "level of concern" (risk of mortality acceptable to EPA). RER1000. When EPA assesses risks to common animals it uses a higher Risk Quotient than with endangered ones, but otherwise uses the identical approach. RER975-76 (listing LOCs, or acceptable RQs, for different taxa); RER976 ("Endangered species acute LOCs are a fraction of the non-endangered species LOCs").

This scheme has EPA looking through the wrong lens. Assessing potential for mortality or "adverse effects" may assist EPA's decision whether to "consider regulatory action" under FIFRA—Congress there gave EPA discretion to balance adverse effects with benefits. But the ESA allows no such balancing, and grants EPA no discretion whether to take regulatory action, nor to decline to consult because it finds the risk of harm is below an arbitrary fraction of a FIFRA-based risk measure. The ESA removes EPA discretion to decide unilaterally how much risk of "adverse effects" allows it to avoid consultation. If EPA believes effects are not likely to be "adverse," it must consult FWS and obtain its concurrence. 50 C.F.R. § 402.13(a).

B. EPA's "No Effect" Decisions Were Arbitrary and Capricious.

Thus, "EPA's risk assessment, designed to answer a question posed by FIFRA (*i.e.*, whether unreasonable adverse effects would result from use of the pesticide), was not designed to answer the question posed by the ESA…." *Wash. Toxics Coal. v. U.S. Dept of Interior*, 457 F. Supp. 2d 1158, 1185 (W.D. Wash. 2006). *See* Opening Br. 40-41. And even had EPA applied the proper standard, EPA's toxicity calculations are only one element of the broader inquiry the ESA requires. 457 F. Supp. 2d at 1184. EPA relied on factors Congress did not intend it to consider, and failed to consider factors it was required to assess, making its "no effect" determinations arbitrary, capricious, and contrary to law. *Motor Vehicle Mfrs. Ass'n.*, 463 U.S. at 42–43.

EPA's analyses also are not necessarily "conservative" factually, either. EPA allowed for "data gaps," ER741, because it does so under FIFRA, RER at 962, but did not consult FWS to try to fill them. It admitted "the risk conclusions in this assessment have increased uncertainty," ER742, but made no effort to consult FWS to decrease it.

EPA's whooping crane risk analysis assumes dicamba is no more toxic to a crane than to a bobwhite quail. EPA does not know (or claim to know) whether this is true—but did not consult FWS to try to confirm it. It simply took the quail

data and "scaled from the weight of the tested surrogate species (bobwhite quail) to reflect the comparatively larger actual size of the whooping crane." ER656.

Similarly, the higher an animal's metabolic rate, the more food it will consume—and the more XtendiMax along with it. EPA assumed whooping cranes' metabolic rate is 757.6 kcal/day, ER657, based on its 1993 Wildlife Exposure Factors Handbook. ER656. Since the Exposures Handbook contains no information about any cranes, EPA assumed a value based on another bird that happened to be in the book, in lieu of consulting FWS.[22] If EPA's estimated value was low, EPA underestimated the animal's intake of XtendiMax—and the risk. Had EPA consulted FWS, it might know better. This is why the Exposures Handbook provides that "Site-specific values for these parameters can be determined more accurately using published studies of local populations and assistance from [FWS]," ER818-19, neither of which EPA consulted. Congress inserted in Section 7(a)(2) a best available science mandate to "prevent an agency from basing its action on speculation and surmise," as EPA did here. *Bennett v.*

[22] EPA tries to lift itself up by its own bootstraps by claiming its 25-year old Exposures Handbook itself authorizes EPA to substitute it for the best available science Section 7(a)(2) expressly requires. EPA Br. 54 n.12. EPA ignores that the Exposures Handbook provides it was to be used for "screening-level risk assessments for common wildlife species," ER815, and its complete absence of data for the actual endangered species EPA assessed.

Spear, 520 U.S. 154, 176 (1977). Avoiding consultation with the expert agency was not "conservative," but just the opposite.[23]

1. EPA Is Due No Deference.

EPA argues the Court should defer to the "considered judgment of EPA as to how to conduct its endangered species analysis," EPA Br. 65, and Monsanto claims EPA's determinations are unreviewable "scientific judgments." Monsanto Br. 50-51. But EPA violated Section 7(a)(2) primarily because its methodology is based on an erroneous legal standard implementing EPA's "interpretive polic[ies]," ER810, not merely debatable facts or scientific determinations. The Court must not "rubber-stamp … administrative decisions … inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." *Ariz. Cattle Growers' Ass'n v. U.S. FWS*, 273 F.3d 1229, 1236 (9th Cir. 2001) (citation omitted). But regardless, EPA has *no expertise in endangered species conservation* or any of the species it assessed—which is why Congress required it to consult FWS. *City of Tacoma, Washington v. F.E.R.C.*, 460 F.3d 53, 75 (D.C.

[23] Respondents set up straw men by claiming Petitioners maintain EPA was prohibited as a matter of law from finding "no effect" for any species within the action area. Monsanto Br. 49-50; EPA Br. 5. Petitioners do not argue such a *per se* rule, but have shown the risk assessments are legally flawed. It is EPA's own Interim Protocols, based on National Academy of Sciences input, that applies such a rule. *See* Opening Br. 41, 50.

Cir. 2006). And because Congress did not empower EPA to implement the ESA, EPA's interpretations are entitled to no deference.

C. EPA's Refusal to Consider Impacts Beyond the Crop Fields Violated the ESA.

EPA unlawfully limited the registration's ESA "action area" to the sprayed crop fields, categorically eliminating hundreds of endangered species and critical habitats from any consultation consideration. ER653. Respondents defend by citing EPA's determination that mitigation measures would preclude XtendiMax traveling beyond those fields. EPA Br. 60-61, Monsanto Br. 48. This defense fails, first, because as this Court observed in *Karuk Tribe*, a mitigation measure laundry list "cuts against, rather than in favor of" no duty to consult, since the perceived need to reduce potential effects underscores that effects are possible. 681 F.3d at 1028.

Second, as the record reveals—and thousands of farmers with crops injured by XtendiMax well know—effects beyond the intended fields were far more than possible. Pesticide drift harmed vegetation on millions of acres. Opening Br. 8-12 (and record citations therein). EPA amended the registration after knowing this (and did virtually nothing to prevent a reoccurrence through volatilization). The agency still refused to revise its ESA assessments or determination in any way. ER72. The adequacy of its action area designation is assessed based on what it knew *at the time of the amended registration*. EPA's argument that the Court

should not "second-guess EPA's expert judgment" concerning zero drift, when it knew widespread drift *had actually occurred,* borders on the absurd. EPA Br. 65.[24]

Third, even when it originally registered the pesticide in 2016, EPA applied the wrong legal standard: that its mitigations "would effectively prevent off-field movement *in amounts greater than the [No Observed Adverse Effect Concentration]*." EPA Br. 41 (emphasis added). "No adverse affect" is less protective than "may affect," and EPA is prohibited from making that call unilaterally. So even if its calculations were accurate, EPA's action area determination allowed for off-field effects on endangered plants and animals requiring consultation, during which EPA could seek FWS's concurrence that those effects were not likely to adversely affect them. EPA's categorical refusal to consult on any species or habitats outside the field boundaries was unlawful.

D. The ESA Caselaw Supports Petitioners.

Respondents' cited cases merely confirm the unremarkable fact that an action agency may make a "no effect" determination under appropriate circumstances: when the best available data show *no effect*. Neither cites a case

[24]Also, an action area must include indirect exposures, 50 C.F.R. § 402.02, and EPA never evaluated the effect on endangered animals outside fields of consuming prey from sprayed fields. Opening Br. 48-49. Monsanto argues EPA did, Monsanto Br. 48-49, but none of its cites support this. EPA also argues it did, but cites only its assessments of the handful of species it evaluated because they actually *inhabit* crop fields, like the whooping crane. EPA Br. 58. EPA nowhere considered that sprayed prey may be consumed by species *outside* the fields.

approving such a determination where an action agency determined a risk constitutes "no effect" simply because it is below the agency's "level of concern," or the No Observed Adverse Effect Concentration.

In *Defenders of Wildlife v. Flowers,* 414 F.3d 1066 (9th Cir. 2005), it was undisputed no members of the species existed near the action. While the plaintiffs argued the action would disrupt the species' habitat, the designation of that habitat as "critical" had been removed, eliminating the legal protections that classification affords all of the critical habitats for the 499 species in the 34 states where EPA approved XtendiMax. *Id.* at 1070.

In *Friends of the Santa Clara River v. Corps of Engineers*, 887 F.3d 906 (9th Cir. 2018), the plaintiffs challenged the Army Corps' "no effect" finding where a project would, during storm events, discharge into a river materials containing dissolved copper that plaintiffs argued might harm steelhead. The Court upheld the finding because it was undisputed the copper levels would be well below the river's background levels and therefore would not increase the risk, if any, the fish already faced. *Id.* at 923-24. The lower court had observed the discharges would actually *lower* any risk, since they would dilute the river's copper concentration. *Ctr. for Biological Diversity v. U.S. Army Corp. of Eng'rs*, No. 14-1667 PSG (CWx), 2015 WL 12659937, at *14-16 (C.D. Cal. June 30, 2015). Here, EPA's analysis does not show the predicted exposures will not

increase any existing risk. Instead, it shows only that it will not increase the risk above EPA's arbitrary "level of concern."

In *Ground Zero Center for Non-Violent Action v. U.S. Department of the Navy*, 383 F.3d 1082 (9th Cir. 2004), the plaintiffs sought consultation arguing missiles might accidentally detonate, harming salmon. However, the decision to house the missiles at the Washington Navy base was made by presidential executive order, not an agency discretionary action subject to the ESA, as here. *Id.* at 1092. In *dicta*, the Court observed the risk of accidental explosion was so speculative as to be "infinitesimal." *Id.* Here, EPA admits species and habitats will be exposed to the toxic herbicide on the fields, but argues the resulting risk is "no effect," not because the likelihood of effect is infinitesimal, but because it is below EPA's arbitrary "level of concern," which does not even measure the likelihood of "any effect," but only of "adverse affect."

The Eighth Circuit in *Newton County Wildlife Association v. Rogers*, 141 F.3d 803 (8th Cir. 1998), did not review the agency's "no effect" determination, but anomalously assumed the finding's mere existence obviated any need to consult. *Southwest Center for Biological Diversity v. Glickman*, 932 F. Supp. 1189, 1194 (D. Ariz. 1996), *aff'd*, 100 F.3d 1443 (9th Cir. 1996) was not brought under the ESA but under the Rescissions Act of 1995, an appropriations measure to expedite awards of salvage timber sale contracts that exempted such sales from the

ESA and all federal environmental laws. 100 F.3d at 1445-46. The agency was required to find whether the sale would affect the Mexican spotted owl, but under the Rescissions Act's relaxed standard "vest[ing] sole discretion in the Secretary to determine the 'scope and content of the documentation and information prepared, considered, and relied on.'" *Id.* at 1448 (citation omitted). The plaintiff objected that the Forest Service disregarded FWS's Mexican spotted owl policy, but under the Rescissions Act, "the Forest Service had no obligation to consider the views of other agencies in approving the salvage timber sale." *Id.* at 1449. The case offers no guidance here.

EPA's efforts to factually distinguish *Karuk Tribe*, *Western Watersheds Project v. Kraayenbrink*, 632 F.3d 472 (9th Cir. 2011), *California ex rel. Lockyer v. U.S. Department of Agriculture*, 575 F.3d 999 (9th Cir. 2009), and *Washington Toxics Coalition v. U.S. Department of the Interior*, 457 F. Supp. 2d 1158, 1179-80 (W.D. Wash. 2006), EPA Br. 47-50, all miss the legal point. These decisions articulate this Circuit's standard for a lawful "no effect" or "may affect" determination, which is lower than the risk/benefit or "adverse effect" approaches EPA applied. EPA also incorrectly declares the cases inapposite. For example, EPA notes the action agency in *Karuk Tribe* did not dispute its activity might affect species, EPA Br. 47, but fails to acknowledge the mining industry intervenor vigorously did, and that the Court held: (1) plaintiffs have no duty to show species

will be harmed, and (2) reliance on mitigation "cuts against, rather than in favor of," a "no effect" finding, *Karuk Tribe*, 681 F.3d at 1028, particularly where mitigation "reduces" impacts, as does the mitigation on which EPA relied here for categorically finding "no effect" on all species and habitats outside crops fields, *see* ER028, ER637 (mitigation "may reduce" off-site XtendiMax movement).

EPA notes *Washington Toxics* confirmed an action agency may make a "no effect" finding, EPA Br. 48, which is undisputed. As EPA admits, the court also invalidated a regulation allowing EPA to unilaterally make "not likely to adversely affect" determinations. *Id.* That is exactly what EPA did here—without such a regulation—by labeling determinations "no effect" where the risk of harm is an arbitrary fraction of the LD_{50} (EPA's "level of concern,") or below the No Observed Adverse Effect Concentration, or is "reduced" by mitigation. Similarly, while EPA tries to distinguish *Kraayenbrink* by citing its own "carefully documented determination that the registration decisions would have no effect on listed species," *id.* 49, it fails to point to any record evidence establishing "no effect," rather than merely "less effect."

E. EPA Violated the ESA's Critical Habitat Protections.

Respondents admit the consultation protocols EPA followed allowed EPA to avoid consulting on any of the hundreds of habitats FWS designated as "critical" to the species' survival and recovery, based on categorical exemptions EPA made up

and that apply only to EPA. Opening Br. 55-56; ER692-92; ER711. Although EPA pronounces its methodology "meticulous," "logical," and so on, EPA Br. 61, neither Respondent meaningfully rebuts that EPA's filters have no basis in the ESA, and contradict it. Neither cites any authority for these protocols, and none exists. EPA "relie[d] on factors Congress did not intend it to consider, and failed to consider factors it was required to assess." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 42–43.

First, Respondents demonstrate they fundamentally misunderstand the consultation standard applicable to critical habitat, which is identical to the low "may affect" standard that applies to ESA-protected species themselves. *Karuk Tribe,* 681 F.3d at 1027. EPA admits it "determines there will be *no adverse modification* of critical habitat," EPA Br. 62 (emphasis added), and its guidance provides EPA decides "whether the expected impacts are '*likely to adversely affect*' the critical habitat." RER995 (emphasis added). Monsanto argues "it was reasonable for EPA to focus on the treated field in evaluating *adverse modification* of critical habitat," Monsanto Br. 53 (emphasis added). EPA lacks authority, under any circumstance, to determine unilaterally whether its registration will cause "adverse modification" of critical habitat. EPA *must* consult if the registration "may affect" critical habitat, and a determination it will not "adversely modify" it requires FWS's written concurrence during consultation. 50 C.F.R. § 402.13(a).

As Respondents admit, EPA categorically refused to consult FWS unless either "(a) the species uses cotton or soybean fields as habitat *and* EPA has already made a "may affect" determination for the species; *or* (b) the species uses cotton or soybean fields *and* the effects from the new uses would affect one of that species' primary constituent elements." EPA Br. 62 (emphases in original).[25] EPA offers no clue why it imagines it has authority to opt out of consultation where the pesticide may affect critical habitat, but the species does not currently occupy it. Whether species currently use a critical habitat is irrelevant to whether EPA must consult. Opening Br. 58-59.

Nor does EPA offer any basis for categorical "no effect" determinations for all critical habitats for which EPA failed to make a "may affect" finding for the species. EPA's critical habitat consultation duties are independent of any direct effect on species themselves. 50 C.F.R. § 402.14(a) (consulting FWS "required" if "any action may affect listed species *or* critical habitat.") (emphasis added).

EPA argues it formulated its critical habitat categorical exemptions in its 2004 Overview, EPA Br. 64, but fails to show that document contains them, or that it matters. EPA claims its analysis is based on impacts to the habitats' primary

[25] *E.g.,* RER1061 ("One-hundred thirteen (113) species with critical habitat were judged to not use cotton or soybean fields and so the critical habitat determination for these was "no modification.").

constituent elements, EPA Br. 63, and considered them "in excruciating detail," *id.* at 66, but admits it does not consider them at all in most cases due to its arbitrary filters, *id.* at 62; *see* RER1185-86 (no analysis of PCEs for any species not occupying crops fields); RER1203 (same). EPA then argues the expert wildlife agencies "acknowledged and espoused" EPA's approach, but fails to show those agencies said anything about EPA's categorical exemptions, or why it would matter legally if they had "acknowledged" an approach at odds with the ESA and their own regulations. *Id.* at 65. EPA's protocols are contrary to law.

III. THE COURT SHOULD VACATE THE REGISTRATION

Vacating the registration and remanding to EPA for proceedings consistent with the Court's decision is the proper remedy for EPA's legal violations. Opening Br. 62-63; 7 U.S.C. § 136n(b). The Court should simply follow its recent precedent in *Pollinator Stewardship* and *Natural Resources Defense Council v. U.S. EPA*, 857 F.3d 1030, 1040 (9th Cir. 2017). As in those pesticide cases, this case does not present the "limited circumstances," *Pollinator Stewardship,* 806 F.3d at 532, or "rare circumstances," *Humane Society of U.S. v. Locke*, 626 F.3d 1040, 1053 n.7 (9th Cir. 2010), to depart from that default, presumptive remedy and allow the continued use of this pesticide despite holding its approval unlawful.

Respondents spill a good deal of ink making novel, far-reaching, and erroneous arguments against vacatur. Accordingly, absent simply ordering vacatur

of the registration pending compliance with FIFRA and the ESA in accordance with established jurisprudence, the Court should order supplemental briefing on remedy.

Respectfully submitted this 29th day of May, 2018.

/s/ George A. Kimbrell
George A. Kimbrell
Sylvia Shih-Yau Wu
917 SW Oak Street, Suite 300
Portland, OR 97205
Telephone: (971) 271-7372
Facsimile: (971) 271-7374
Email:gkimbrell@centerforfoodsafety.org
Email: swu@centerforfoodsafety.org

/s/ Paul H. Achitoff
Paul H. Achitoff
Earthjustice
850 Richards Street, Suite 400
Honolulu, HI 96813
Telephone: (808) 559-2436
Facsimile: (808) 521-6841
Email: achitoff@earthjustice.org

Counsel for Petitioners

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1 and 32-2(b), this brief is proportionately spaced, has typeface of 14 points or more and contains 8,397 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

DATED: May 29, 2018.

/s/ Paul H. Achitoff
Paul H. Achitoff

Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28.1-1(f), 29-2(c)(2) and (3), 32-1, 32-2 or 32-4 for Case Number 17-70196

Note: This form must be signed by the attorney or unrepresented litigant *and attached to the end of the brief.*

I certify that (*check appropriate option*):

☐ This brief complies with the length limits permitted by Ninth Circuit Rule 28.1-1.
The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☐ This brief complies with the length limits permitted by Ninth Circuit Rule 32-1.
The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☒ This brief complies with the length limits permitted by Ninth Circuit Rule 32-2(b).
The brief is [8,397] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable, and is filed by (1) ☐ separately represented parties; (2) ☒ a party or parties filing a single brief in response to multiple briefs; or (3) ☐ a party or parties filing a single brief in response to a longer joint brief filed under Rule 32-2(b). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☐ This brief complies with the longer length limit authorized by court order dated [ ]
The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6). The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable.

☐ This brief is accompanied by a motion for leave to file a longer brief pursuant to Ninth Circuit Rule 32-2 (a) and is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32 (f), if applicable. The brief's type size and type face comply with Fed. R .App. P. 32(a)(5) and (6).

☐ This brief is accompanied by a motion for leave to file a longer brief pursuant to Ninth Circuit Rule 29-2 (c)(2) or (3) and is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☐ This brief complies with the length limits set forth at Ninth Circuit Rule 32-4.
The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

Signature of Attorney or Unrepresented Litigant: /s/ Paul H. Achitoff

Date: May 29, 2018

("s/" plus typed name is acceptable for electronically-filed documents)

(Rev.12/1/16)

9th Circuit Case Number(s) 17-70196

NOTE: To secure your input, you should print the filled-in form to PDF (File > Print > *PDF Printer/Creator*).

****

CERTIFICATE OF SERVICE
When All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) May 29, 2018 .

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature (use "s/" format) /s/ Paul H. Achitoff

****

CERTIFICATE OF SERVICE
When Not All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) .

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

Signature (use "s/" format)